Landmark Installations, Inc. *and* Local Union No. 272 and Shopmen's Local Union No. 698 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers. Cases 12–CA–21376 and 12–CA–21441

June 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On January 22, 2002, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The General Counsel filed an exception and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and adopt the recommended Order as modified below.[2]

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge and orders that the Respondent, Landmark Installations, Inc., Pompano Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, mail to all current and former employees employed by the Respondent at any time since March 2001 a copy of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by an authorized representative of the Respondent, shall be mailed to the persons above-stated immediately upon receipt. Proof of such mailings, with the names and addresses of the persons to whom the notices were mailed and the date of such mailings, shall be furnished to the Regional Director for Region 12, within 5 days after such notices were mailed."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully interrogate our employees concerning their membership in Local Union No. 272 and Shopmen's Local Union No. 698 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers, AFL–CIO and/or their union activities and sympathies and those of their fellow employees.

WE WILL NOT inform our employees that it would be futile for them to select the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees with closure of our Pompano Beach, Florida facility if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees with discharge, layoffs and unspecified reprisals if they select the Union as their collective-bargaining representative.

[1] There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employees concerning their union membership, informing its employees that it would be futile for them to select the Union as their collective-bargaining representative, threatening employees with closure of the Pompano Beach, Florida facility if the employees selected the Union as their collective-bargaining representative, and threatening its employees with layoffs, discharge, and unspecified reprisals if the employees selected the Union as their collective-bargaining representative or engaged in union activities. There are also no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee Adolfo Gonzalez and by laying off five employees and refusing to consider these employees for recall and/or to recall them.

[2] In its exception, the General Counsel argues that the judge inadvertently failed to direct the Respondent to mail the notice to employees to all of its employees. The General Counsel argues that this is necessary because the Respondent's employees work at different construction jobsites outside of the Respondent's office, and because the Respondent's employees employed at the time of its unlawful conduct may not currently be employed. The Respondent does not controvert any of the facts asserted by the General Counsel supporting its request and filed no opposition to the General Counsel's exception.

WE WILL NOT discharge our employees, lay off our employees and/or refuse to consider them for rehire and/or refuse to rehire them because of their membership in a union or their engagement in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of this Order offer full reinstatement to Adolfo Gonzalez, Lawrence Hodgson, Luis Felix Gonzalez, Bertie Gottshaw, Raidel Rivero, and Jose Zepeta to their former jobs or to substantially equivalent jobs if their former jobs no longer exist and will make them whole for all loss of earnings and benefits sustained by them because of our unlawful discharge of Adolfo Gonzalez and the unlawful layoffs and refusal to consider for rehire and refusal to rehire Lawrence Hodgson, Luis Felix Gonzalez, Bertie Gottshaw, Raidel Rivero, and Jose Zepeta, with interest.

WE WILL within 14 days from the date of this Order remove from our records any reference to the unlawful discharge of Adolfo Gonzalez and the unlawful layoffs, refusal to consider for rehire and refusal to rehire of Lawrence Hodgson, Luis Felix Gonzalez, Bertie Gottshaw, Raidel Rivero, and Jose Zepeta and will notify them in writing that the unlawful discharge of Adolfo Gonzalez and layoffs and refusal to consider for rehire and refusal to rehire the other above-named employees will not be used against them in any way.

LANDMARK INSTALLATIONS, INC.

Marcia Valenzuela, Esq. and *Jennifer Burgess-Solomon, Esq.,* for the General Counsel.
Mitchell J. Olin, Esq., for the Respondent.
Brian Rodgers, Union Business Manager, for the Charging Party.

DECISION

STATEMENT OF THE CASE [1]

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case was heard before me on October 9 and 11, 2001, in Miami, Florida. The complaint as amended at the hearing was issued by the Regional Director of Region 12 of the National Labor Relations Board (the Board) on charges filed by Local Union No. 272 and Shopmen's Local Union No. 698 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers, AFL–CIO (the Charging Party or the Union) and is based on amended charges filed in Case 12–CA–21376 on May 25, 2001, and in Case 12–CA–21441 on May 25, 2001, and alleges that Landmark Installations, Inc. (the Respondent or the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent has by its answer as amended at the hearing denied the commission of any violations of the Act and has raised affirmative defenses thereto.

On the entire record, including testimony of the witnesses and exhibits received in evidence and after review of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits and I find that at all times material herein during the 12 months preceding the filing of the complaint Respondent has been a Florida corporation, with an office and place of business located in Pompano Beach, Florida, where it has been engaged in the construction business as an awnings installer and that in conducting its business operations, it purchased and received at its Pompano Beach facility goods and materials valued in excess of $50,000 from other enterprises, including Innovative Business Solutions located within the State of Florida, each of which other enterprises had purchased and received these goods and material directly from points located outside the State of Florida and Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

Landmark is a construction company which installs steel frames, landings, and decks. It commenced its operations in October 1999. Its owner and president is Michael Herman. Landmark undertook a steel-framing project on Pembroke Road known as the Pembroke project in February 2001. The jobsite supervisor was Daniel Arnouil. Herman and Arnouil were at all times material herein supervisors and agents of Respondent under Section 2(11) and (13) of the Act. The Pembroke job which commenced in late February 2001, was finished in April 2001. Respondent hired a number of ironworkers to set up a steel frame, weld and install steel flooring for the Pembroke job. The evidence disclosed that Respondent hired these employees without knowing whether they were union members or not. Included among these workers were several members of the Union who had been informed by the Union or by fellow employees that Respondent was hiring iron workers for the project. Among those who applied and were hired were union members Adolfo Gonzalez, Lawrence Hodgson, Bertie Gottshaw, Luis Felix Gonzalez, Jose Zepeta, Raidel Rivero, and Issac Thomas. These employees were hired without regard to their union or nonunion status and sympathies and none were questioned concerning their union affiliation or sympathies. None of these employees wore any items referring to their union membership. Lawrence Hodgson was an active union organizer. He discussed the advantages of union membership with nonunion employees and reported daily to Union Business Manager Brian Rodgers.

[1] All dates are in 2001 unless otherwise noted.

On Friday, March 9, 2001, the Union filed a petition for an election asserting that they had the support of the requisite number of employees in the unit who supported the Union in its bid to represent the Respondent's employees. Respondent's president, Herman, received the notice of a petition for an election which was forwarded by the Board on that same date. On the following Monday, March 12, 2001, Jobsite Supervisor Dan Arnouil, with Herman behind him, questioned each of the employees on the Pembroke jobsite shortly before and during their 10 a.m. morning break as to whether they were members of the Union. Bertie Gottshaw, Louis Felix Gonzalez, Jose Zepeta, and Raidel Rivero all testified they readily admitted they were union members but denied having initiated a union campaign at the Pembroke job. Lawrence Hodgson initially denied his union membership but later admitted it when confronted by Respondent with information obtained by Respondent from other nonunion employees that he was the leading union organizer on the job. He also told Arnouil and Herman that employees Raidel Rivero and Adolfo Gonzalez were union members.

As Arnouil and Herman were questioning employees Adolfo Gonzalez returned from his break and Arnouil turned on Gonzalez and stated he could not believe that the Union would admit to membership a "worthless piece of shit" such as Gonzalez. This triggered an immediate angry response from Gonzalez with the two men getting face to face in an angry confrontation with Arnouil waving his finger in front of Gonzalez' face which Gonzalez started to push away. Gonzalez did not touch Arnouil. Arnouil pulled back and threatened to call the police for harassment by Gonzalez. Herman attempted to quiet the confrontation down and told Arnouil there was no need for the police. Arnouil then fired Gonzalez. Gonzalez said he would leave as soon as he got his paycheck. Herman made arrangements for his wife to bring the paycheck to the jobsite which she did shortly thereafter and Gonzalez departed. The termination of Gonzalez by Respondent has not been rescinded and he has not been recalled by Respondent. In order to stem the Union's campaign at its Pembroke jobsite Respondent threatened employees with plant closure, layoff and discharge, and informed the employees of the futility of their support of the Union. Respondent laid off the leading union organizer Hodgson on March 22, 2001, and union supporters Gottshaw, Luis Felix Gonzalez, Zepeta, and Rivero on March 30, 2001. Respondent also failed to consider these employees for recall and to recall them at Respondent's other jobsites in Florida in contrast to its practice of transferring employees from one jobsite to another. Respondent replaced the union supporters with three nonunion employees to perform welding. Other employees who had less seniority than the laid-off employees were transferred to other jobsites in Florida after the conclusion of the Pembroke jobsite. At the time of the hearing all of Respondent's employees were nonunion supporters.

The 8(a)(1) Violations

A. Interrogation

Raidel Rivero testified that on March 12, 2001, shortly before the employees morning break, Respondent's President Herman asked if he was a union member. He told Herman that he was. Bertie Gottshaw testified that shortly before break on March 12, he observed Herman with a piece of paper talking to two nonunion supporters and Herman then told the employees that the Union was going to close the job down as 30 percent of the employees were union supporters. Herman then asked Gottshaw if he was union and Gottshaw replied that he was. Lawrence Hodgson testified that shortly before breaktime on March 12, Herman and Arnouil told him they had received a paper stating that 30 percent of the employees supported the Union. They then asked him if he were a union member which he denied as he had been advised to do by Union Business Manager Brian Rodgers. He testified further that after the break he was again approached by Herman and Arnouil who told him that they had been told by other employees that he was sending reports to the Union. They asked Hodgson why he had not admitted to Respondent that he was the leader of the union campaign on the jobsite. He then admitted his role in the campaign and also told them that Adolfo Gonzalez and Raidel Rivero, were union members in response to their questioning of him. Gregory Penn, a current employee and a nonunion supporter testified that Herman and Arnouil told the employees that Herman had received a letter from the Union which was trying to shut the job down and then asked the employees who the union supporters were. Herman admitted at the hearing that he and Arnouil questioned the employees about their union membership. Herman also admitted that he had been informed by nonunion supporters Gregory Penn and Alfredo Wesley that Hodgson was the leader of the Union's campaign at the jobsite in response to his and Arnouil's questioning of them.

I credit the testimony of employees Rivero, Gottshaw, Hodgson and Penn as set out above which was unrebutted as Herman admitted that he and Arnouil had questioned the employees, and Arnouil did not testify. I find without merit Herman's attempts to explain his conduct by stating he was confused by the petition and was merely seeking information by questioning the employees. This is not a valid defense to the allegation that he unlawfully interrogated the employees about their union membership activities and sympathies and those of their fellow employees. I also find without merit Herman's contention that he was a bystander while Arnouil interrogated employees. Clearly by his presence and his own conduct Herman was in tandem with Arnouil in engaging in this interrogation of the employees. I find that Respondent, by its supervisors and agents, Herman and Arnouil, violated Section 8(a)(1) of the Act by interrogating its employees about their union membership and sympathies and those of their fellow employees. *Hoffman Fuel Co.*, 309 NLRB 327 (1992).

B. Threat of Closure

Adolfo Gonzalez testified that on March 12, he heard Herman say that the Union was taking over his business or shutting it down. Herman admitted at the hearing that he told the employees on March 12 that he would have to close the company if the Union won the election and that he did not explain why he would have to close down and the employees did not ask questions. At the hearing he testified he was referring to statements attributed to the Union that the employees would earn $20 per hour if the Union won the election. However he admit-

tedly did not explain this to the employees. Additionally Hodgson testified that on March 14, Herman told him he would shut the job down before the Union took over the Company.

I credit the unrebutted testimony of Adolfo Gonzalez and Hodgson as set out above and note the admission of Herman that he made the statement attributed to him about closure of his business and the job. Herman's professed intent or state of mind concerning the reason for his threat of closure is irrelevant in this case. I find that his threat of plant or job closure was coercive and violative of Section 8(a)(1) of the Act.

C. Threat of Futility of the Support of the Union

Herman admitted at the hearing that on March 12, he told the employees that the Union would not be good for a small company such as his company and that he would not have the Union run his company. He offered an explanation at the hearing that he was referring to union wages and benefits which he believed would put him out of business. However he did not offer this explanation to the employees. His purported state of mind concerning the reasons for his statements to the employees is irrelevant. His subsequent written statement to employees in his letter of April 17 reinforced his earlier threat by stating in pertinent part that the employees would not gain any benefits from the Union's involvement.

Thus his statement of March 12 as reinforced by the April 17 letter to employees was clearly a threat of the futility of the employees' support for the Union and violated Section 8(a)(1) of the Act. *Wellstream Corp*., 313 NLRB 698, 706 (1994).

D. Threats of Layoff and Discharge

Gottshaw testified that on March 12, Arnouil told a group of employees that he had received the petition and that he could lay off and fire everybody on the job. Gottshaw further testified that Arnouil also told the employees he did not care less who wanted to leave the job. Aldolfo Gonzalez testified that as he was returning from break he heard Arnouil tell the employees that he was going to start firing people starting with Adolfo Gonzalez who he called a "worthless piece of shit" whereupon he turned on him and ultimately discharged him.

Hodgson also testified that Arnouil threatened to discharge him after Hodgson admitted to his union activities when confronted by Arnouil a second time.

I credit the testimony of Adolfo Gonzalez and Hodgson as set out above which was unrebutted as Arnouil did not testify and Herman did not rebut this testimony. I thus find that Respondent violated Section 8(a)(1) of the Act by threatening employees with layoff and discharge. *Bestway Trucking*, 310 NLRB 651, 671 (1993).

E. Threat of Unspecified Reprisals

Hodgson testified that on March 14, Herman refused to help him carry a box of heavy rods and stated that he could not help Hodgson because he (Herman) was not a union member. This statement by Herman to Hodgson occurred only 2 days after the incidents of March 12, when Hodgson had been discovered by Respondent to have been the leading union organizer on the jobsite. This statement was clearly coercive and a threat of unspecified reprisals for his role as the leading union organizer and was violative of Section 8(a)(1) of the Act. *F. W. Woolworth Co*., 310 NLRB 1197, 1200 (1993).

F. The Discharge of Adolfo Gonzalez

Several factors are considered by the Board in analyzing discrimination cases under Section 8(a)(3) and (1) of the Act in accordance with *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The General Counsel must establish that the employer had animus against the Union, had knowledge that the alleged discriminatee was a union supporter and/or of the alleged discriminatees' union activities and took an adverse job action against the employee which was motivated at least in part by its antiunion animus. In making this determination the timing of the adverse job action in relation to the animus and knowledge of the employees' union membership, union activities and sentiments is to be considered to determine whether there is a nexus between the adverse job action and the employees' union affiliation. *Masland Industries*, 311 NLRB 184 (1993)

In the case before me, it is clear that all of the elements required to establish a prima facie case are present. Herman received the petition for an election on March 9, a Friday, and showed it to Arnouil and then both commenced questioning employees on March 12, the following Monday morning shortly before the morning breaktime with Arnouil issuing threats of discharge to the employees. Leading union advocate Hodgson initially denied any knowledge of union activities when questioned by Herman and Arnouil, but subsequently admitted his union role when told by Arnouil that other employees had identified him as the leader of the union campaign. When asked by Arnouil who the other union members were, Hodgson identified Raidel Rivero and Adolfo Gonzalez as union members. At this point Adolfo Gonzalez was returning from his break and Arnouil immediately turned on him calling him a worthless piece of shit which led to an angry verbal confrontation between Adolfo Gonzalez and Arnouil who was putting his finger up to the face of Adolfo Gonzalez. When Adolfo Gonzalez moved to brush the finger away from his face, Arnouil threatened to call the police. Upon being told by Herman that the police were not necessary, Arnouil proceeded to discharge Adolfo Gonzalez.

Under these circumstances it is clear that the Respondent had animus against the Union and its supporters as established by the numerous 8(a)(1) violations and the record as a whole. It is clear that Respondent had knowledge that Adolfo Gonzalez was a union member, having just been identified as a union member by Hodgson. It is undisputed that Arnouil turned on Adolfo Gonzalez and engaged in an angry confrontation with him threatening to call the police and then discharged him. There was no evidence or contention that Adolfo Gonzalez engaged in any physical contact with Arnouil. Rather it is clear that Arnouil was the aggressor in this confrontation. Cleary the nexus between Respondent's antiunion animus and the discharge of Adolfo Gonzalez has been established. *Masland Industries*, supra.

Once the General Counsel has established a prima facie case that the protected conduct (engagement in union activities and in this case union membership) was a motivating factor in an

employer's action against the employee (the discharge of Adolfo Gonzalez) the burden shifts under *Wright Line*, supra to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. This burden is not carried by merely showing that it also had a legitimate reason for the taking the adverse action. Rather it must "persuade" that the action would have taken place in the absence of the protected conduct "by a preponderance of the evidence." *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984). If the employer fails to carry its burden of persuasion, a violation will be found. *Bronco Wine Co*., 256 NLRB 53 (1981).

I find that Respondent has failed to carry its burden of persuasion in the instant case. Initially the testimony of what occurred as related by the employees who testified was not rebutted by Arnouil who did not testify and was largely admitted by Herman. In its shifting defenses, Respondent initially attempted to cast Adolfo Gonzalez as a poor worker who was discharged because of poor job performance. It then contended that Gonzalez was discharged because of his engagement in the confrontation with Arnouil, ignoring the undisputed fact that Arnouil initiated the confrontation and turned on Adolfo Gonzalez immediately after learning he was a member of the Union. Herman testified that Adolfo Gonzalez was a slow worker and that Arnouil had previously joked with him that Gonzalez must be Herman's uncle because he had retained him as an employee in spite of his alleged poor work performance. I find these defenses without merit and credit Adolfo Gonzalez' unrebutted testimony that he had never been apprised by either Herman or Arnouil that his work was deficient, that he had several years' experience as an ironworker, had worked on large commercial jobs, had never been discharged (as opposed to a layoff for lack of work), was rehired by a former employer and was working as an ironworker at the time of the hearing. I thus find that the General Counsel has established a prima facie case of a violation of Section 8(a)(3) and (1) of the Act, that Adolfo Gonzalez was discharged by Respondent because of his membership in the Union. I find Respondent has failed to rebut the case by the preponderance of the evidence. *Wright Line*, supra; *Sea Ray Boats, Inc*., 336 NLRB 779 (2001).

G. Alleged Unlawful Layoffs, Failure to Consider for Recall and Failure to Recall

The complaint alleges that Respondent laid off employee Lawrence Hodgson on March 22, 2001, and laid off employees Luis Felix Gonzalez, Bertie Gottshaw, Raidel Rivero, and Jose Zepeta on March 30, 2001, and that since their layoffs Respondent has failed to consider for recall and has failed to recall all of these employees. All of these employees except Zepeta testified concerning their layoffs and Respondent's president, Herman, admitted that these employees were laid off by Respondent and that they have never been recalled by Respondent. Herman also conceded on cross-examination that Respondent has hired new employees since the layoff of the above-named employees and has transferred other employees to other jobs. Herman also concedes there were several other jobs continuing up to the date of the trial which were filled by new employees and by the transfer of other employees. Nonunion employee Alfredo Wesley, was recalled to another job in June after having been laid off. As of the dates of their layoffs the Respondent had purged itself of all the union members with the exception of Issac Thomas. The initial layoff of Hodgson on March 22 and of Luis Felix Gonzalez, Gottshaw, Rivero, and Zepeta on March 30 occurred close in time to March 12 when the Respondent, upon learning of the union campaign, had interrogated and threatened its employees concerning their union membership and support and that of their fellow employees and had learned these employees were union members and had discharged Adolfo Gonzalez all as set out above in this decision. It is clear that Respondent knew who the union members were following the interrogation of all its employees on March 12. Hodgson testified that on the second inquiry of him by Arnouil and Herman, he admitted his role as the Union's organizer on the job. In response to further questioning by Arnouil and Herman, he also told them that employees Raidel Rivero and Adolfo Gonzalez were union members. Further nonunion employee Gregory Penn who was currently employed by Respondent as of the date of the hearing testified that Raidel Rivero, Luis Felix Gonzalez, Jose Zepeta, Issac Thomas, and Bertie Gottshaw all told Arinouil and Herman that they were union members also.

As in the case of Adolfo Gonzalez, Respondent has offered shifting defenses to the layoff allegations. Initially Herman testified that the five discriminates were laid off because of lack of work on the Pembroke job. Herman admitted that he told the employees that he would recall them as new work became available. However as of the date of the hearing he had not recalled any of them. During this period he kept nonunion employees working by transferring them to other jobs as they became available. When confronted with this apparent disparate treatment. Herman offered testimony to the effect that the employees were poor performers and/or had poor attendance by arriving late or not showing up. He acknowledged he had tolerated these alleged deficiencies without discussing them with the employees. It is clear that the distinguishing line between these discriminates and the nonunion employees was that these discriminates were union members who Respondent sought to eliminate from its work force. The employees testified concerning their work performance. They all had years of experience and had performed iron work on larger projects than the Respondent's project. None of them had ever been advised of any deficiencies in their work performance or attendance by Respondent.

I find that as in the case of the discharge of Adolfo Gonzalez the General Counsel has established a prima facie case of violations of Section 8(a)(3) and (1) of the Act by Respondent. The General Counsel has established that the Respondent had animus against the Union and its supporters as borne out by the independent 8(a)(1) violations which I have found and the record as a whole. It has also been established that Respondent had knowledge of the Union membership of each of the discriminatees who were laid off as set out above. It has also been established that Respondent laid off the discriminates which was an adverse job action although there was still some work on the Pembroke project as testified to by discriminates Gottshaw and Luis Feliz Gonzalez while three new employees were brought in to perform welding and while other nonunion em-

ployees were not laid off. Some were transferred to other jobs as testified by current employees. It has thus been established that the layoffs and refusal to consider for recall and refusal to recall the discriminatees were motivated by Respondent's anti union animus. The timing of these adverse job actions clearly establishes the nexus between the adverse job actions and the employees' union membership. *Wright Line*, supra; *Masland Industries*, supra. I further find that the burden has shifted under *Wright Line* to the Respondent to demonstrate that it would have taken the same actions even in the absence of the protected conduct. I find that Respondent has failed to carry its burden of persuasion in this case as it has not demonstrated that it would have taken the same actions even in the absence of the protected conduct and that Respondent has thus violated Section 8(a)(3) and (1) of the Act. *Wright Line*, supra; *Roure Bertrand Dupont, Inc*., supra, *Bronco Wine Co.*, supra, and *Sea Ray Boats, Inc.*, supra. Counsel for the General Counsel has shown, through all of the above, that (1) Respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that it excluded the discriminatees from the hiring or recall process; (3) that the discriminatees had experience and training relevant to the generally known requirements of the positions; and (4) that anti-union animus contributed to the decision not to consider for recall and to recall the discriminates. See *FES*, 331 NLRB 9 (2000).

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating its employees concerning their union membership, union activities and sympathies and those of their fellow employees.

(b) Informing its employees that it would be futile for them to select the Union as their collective-bargaining representative.

(c) Threatening its employees with closure of its Pompano Beach, Florida facility, if the employees selected the Union as their collective-bargaining representative.

(d) Threatening its employees with layoffs, discharge, and unspecified reprisals if the employees selected the Union as their collective-bargaining representative or engaged in union activities.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging its employee Adolfo Gonzalez on March 12, 2001.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by laying off its employee Lawrence Hodgson on March 22, 2001, and by laying off its employees Luis Felix Gonzalez, Bertie Gottshaw, Raidel Rivero, and Jose Zepeta on March 30, 2001, and by failing and refusing to consider these employees for recall and/or to recall them.

6. The above unfair labor practices in connection with the business of the Respondent have the effect of burdening commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that the Respondent violated the Act, it shall be ordered to cease and desist therefrom and take certain affirmative actions including the rescinding of the unlawful discharge and layoffs, refusals to consider for rehire, and refusals to rehire or otherwise discriminating against its employees. I recommended that the discriminatees be offered reinstatement to their former positions or to substantially equivalent ones if their former positions no longer exist without prejudice to their seniority or other rights and privileges previously enjoyed or to which they would have been entitled in the absence of the discrimination against them from the date of the discharge of Adolfo Gonzalez and the layoffs of the other discriminatees. These amounts shall be computed in the manner prescribed in *F. W. Woolworth*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [2]

ORDER

The Respondent, Landmark Installations, Pompano Beach, Florida, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union membership, activities and sympathies and those of their fellow employees.

(b) Informing its employees that it would be the futile to select the Union as their collective-bargaining representative.

(c) Threatening its employees with closure of its Pompano Beach, Florida facility if the employees select the Union as their collective bargaining representative.

(d) Threatening its employees with discharge, layoff, or unspecified reprisals if the employees select the Union as their collective-bargaining representative or engage in union activities.

(e) Discharging employees because of their union membership or engagement in union activities.

(f) Laying off its employees and/or refusing to consider them for recall and refusing to recall them because of their union membership or engagement in union activities

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer Adolfo Gonzalez, Raidel Rivero, Luis Felix Gonzalez, Bertie Gottshaw, Lawrence Hodgson, and Jose Zepeta immediate and full reinstatement to their former positions with Respondent, without prejudice to their length of service, seniority or other rights

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and privileges previously enjoyed and make all of the above-named employees whole, with interest for any loss of earnings and benefits that they may have suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's order, remove from the personnel file of each of the above named employees any reference to the unlawful discrimination against them and, within three days thereafter, notify them in writing that this has been done and that it will not be used against them in any way.

(d) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2001.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."